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5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**
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8 Tohono O'odham Nation, et al.,

9 Plaintiffs,

10 v.

11 United States Department of Interior, et al.,

12 Defendants.
13

No. CV-24-00034-TUC-JGZ

ORDER

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15 Plaintiffs, the Tohono O'odham Nation, the San Carlos Apache Tribe, Archaeology
16 Southwest (ASW), and the Center for Biological Diversity (CBD) filed this action against
17 Defendants, United States Department of Interior, Deb Haaland, and United States Bureau
18 of Land Management (BLM), under the Administrative Procedures Act (APA), alleging
19 BLM violated the National Historic Preservation Act (NHPA) when it authorized
20 construction to begin on the SunZia Transmission Line without assessing the Project's
21 impacts on Traditional Cultural Properties (TCPs) or consulting with Plaintiff Tribes. (Doc.
22 16.) Plaintiffs seek a temporary restraining order and preliminary injunction to halt the
23 Project's construction through the San Pedro Valley TCP. (*Id.* at 7.) On February 8, 2024,
24 the Court granted SunZia's motion to intervene.¹ (Doc. 10.) Plaintiffs' motion is fully
25 briefed. (Docs. 16, 27-29, 30-33, 35, 43.) On March 13, 2024, the Court held oral argument.
26 (Doc. 48.) For the reasons that follow, the Court will deny Plaintiffs' request for injunctive
27 relief.

28 ¹ The Court will refer to Defendants and Intervenor-Defendants collectively as "Defendants."

I. BACKGROUND

A. The Project

The SunZia Transmission Line (the Project) and associated wind projects are the largest clean renewable energy infrastructure project in U.S. history. (Doc. 27 at 11.) The Project consists of a 550-mile high-voltage transmission line that will deliver renewable energy from wind energy generating projects in New Mexico to three million customers in Arizona and California. (*Id.*) The Project route cuts through the San Pedro Valley in Arizona.

The San Pedro Valley is one of the most culturally intact landscapes in Southern Arizona. (*See* Doc. 16-8.) People have been living and traveling along the San Pedro River for the last 12,000 years and evidence of this past human activity remains to this day. (*Id.*) Because of its human history, the San Pedro Valley is an area of great cultural significance to several Native American Tribes including the Tohono O’odham Nation, the San Carlos Apache Tribe, the Hopi Tribe, and the Pueblo of Zuni. (*See* Doc. 16-9 at 4; Doc. 16-10 at 4-5; Doc. 16-11 at 6; Doc. 16-12 at 16; Doc. 16-13 at 19-22.)

B. Legal Requirements

When a proposed federal agency action will have environmental impacts, including impacts on historic and cultural resources, the acting agency must comply with the regulations set forth in the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). 42 U.S.C. § 4336; 54 U.S.C. § 306108.

The NEPA requires a federal agency to prepare an Environmental Impact Statement (EIS) when a proposed federal action may significantly impact the human environment. 42 U.S.C. § 4336. The key steps in the EIS process are: (1) Notice of Intent (NOI), which notifies agencies and individuals about the proposed action; (2) scoping, which is the period in which the federal agency and the public collaborate to define the range of issues and potential alternatives to be addressed in the EIS; (3) Draft Environmental Impact Statement (DEIS), which is published for review and comment for 45 days, and provides a description of the proposal, its impacts, and analysis of various alternatives; (4) the Final Environmental Impact Statement (FEIS), in which the acting agency responds to issues

1 raised on the DEIS; and (5) the Record of Decision (ROD), which explains the agency's
2 decision, describes the alternatives the agency considered, and discusses plans for
3 mitigation and monitoring. 42 U.S.C. §§ 4321-4347.

4 Section 106 of NHPA requires federal agencies to consider the potential effects of
5 federal agency “undertakings” on historic properties. 54 U.S.C. § 306108. An
6 “undertaking” is defined broadly to include any “project, activity, or program” that requires
7 a federal permit. *Id.* at § 300320. “Historic property” includes any prehistoric or historic
8 district, site, building, structure, or object included on, or eligible for inclusion on, the
9 National Register of Historic Places (NRHP). *Id.* at § 300308. A Traditional Cultural
10 Property (TCP) is a property that is eligible for inclusion in the NRHP based on its
11 associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social
12 institutions of a living community. (Doc. 16-3 at 4.) TCPs may include “cultural
13 landscapes.” (*Id.* at 12.)

14 Where an agency determines that an “undertaking” has the potential to cause effects
15 on “historic properties,” the regulations provide for a four-step process:

- 16 (1) Initiate the Section 106 process;
- 17 (2) Identify, through reasonable and good faith efforts, historic properties
18 within the area of potential effects (APE), and evaluate eligibility for listing
19 historic properties on the National Register;
- 20 (3) Assess whether effects of the undertaking on any eligible historic
21 property is adverse; and
- 22 (4) Seek to resolve any adverse effects.

23 36 C.F.R. § 800.3-800.6. These steps are accomplished through consultation with
24 interested parties. *Id.* at § 800.1(a). Specifically, an agency must consult with any Native
25 American Tribe “that attaches religious and cultural significance to [the affected] property”
26 and provide the Tribe “a reasonable opportunity to identify its concerns about historic
27 properties, advise on the identification and evaluation of historic properties, including those
28 of traditional religious and cultural importance, . . . and participate in the resolution of
adverse effects.” *Id.* at § 800.2(c)(2)(ii).

1 In certain circumstances, an agency may enter into a Programmatic Agreement (PA)
2 as a procedural substitute for implementation of the Section 106 process. *Id.* at § 800.14(b).
3 When the “alternatives under consideration consist of corridors or large land areas,” the
4 PA allows the agency to “defer *final* identification and evaluation of historic properties”
5 until after an agency has approved an undertaking. *Id.* at § 800.4(b)(2) (emphasis added).
6 However, the agency must “proceed with the identification and evaluation of historic
7 properties” as specific aspects of the undertaking are “refined.” *Id.* Compliance with the
8 PA procedures satisfies the agency’s Section 106 responsibilities. *Id.* at § 800.14(b)(2)(iii).²

9 **C. Project Compliance**

10 In 2008, SunZia applied to BLM for a right-of-way (ROW) permit to construct and
11 operate a transmission line from New Mexico to Arizona. (Doc. 16 at 13; Doc. 27 at 15.)
12 In 2009, BLM published a NOI to prepare an EIS pursuant to the NEPA. 74 Fed. Reg.
13 25,764 (May 29, 2009).

14 In May 2009, BLM sent a letter to twenty-one Native American Tribes initiating
15 Section 106 tribal consultation under NHPA. (*See, e.g.*, Doc. 33-1 at 29-31; Doc. 33 at 5;
16 Doc. 35-1 at 11.) BLM held consultation meetings with fourteen interested Tribes between
17 July 2009 and December 2012, including at least seven meetings with the Tohono
18 O’odham Nation and the San Carlos Apache Tribe. (Doc. 28 at 4; Doc. 28-1 at 2; Doc. 28-
19 2 at 2-6.) In 2009, BLM conducted a Class I survey to identify cultural resources along
20 alternative routes through reviews of existing data and literature. (Doc. 28 at 3.) In 2010,
21 BLM initiated Class II surveys consisting of targeted field surveys of a sample of route
22 locations. (*Id.* at 3-4.)

23 In April 2012, BLM sent another letter to the twenty-one Tribes it had originally
24 contacted, plus six additional Tribes, providing an update on the Project and the NEPA and
25 NHPA processes. (Doc. 35-1 at 11; *see, e.g.*, Doc. 33-2 at 2.)

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27 ² Prior to adopting a PA, an agency is required to consult with affected Tribes, SHPOs, and
28 others, provide for public participation, and notify the consulting parties of the execution
of the agreement and its effective date. 36 C.F.R. §§ 800.14(b)(2) & 800.6. Plaintiffs do
not challenge BLM’s compliance with these procedures.

1 In May 2012, BLM published the DEIS for public comment. (Doc. 16 at 15; Doc.
2 35-1 at 10.) BLM received feedback from various commentors expressing concerns about
3 BLM's consultation efforts with interested parties and its delay in initiating the Section
4 106 process.³ (Doc. 16-19 at 41-43; Doc. 16-20 at 2-3; Doc. 16-21.) In November 2012,
5 BLM organized a visit to cultural resource sites in the San Pedro Valley which Officers
6 from the Tohono O'odham Nation attended. (Doc. 33-2 at 33-39.)

7 In June 2013, BLM published the FEIS. (Doc. 16-19; Doc. 30-2 at 2.) The FEIS
8 responded to substantive comments on the DEIS and explained that, after analyzing various
9 alternatives, BLM had selected the "preferred alternative route" (the Project route) through
10 the San Pedro Valley because it had the fewest impacts to cultural resources. (See Doc. 16-
11 19; see Doc. 30-2 at 2.) The FEIS stated that Section 106 consultation was ongoing and
12 would result in a PA that would establish Project-specific procedures for BLM to comply
13 with NHPA. (Doc. 16-19 at 25-26.)

14 In December 2014, BLM and consulting parties executed the PA, which outlined
15 BLM's continued obligations under Section 106 of NHPA. (See Doc. 16-24.) Specifically,
16 the PA provided that (1) the identification of historic properties, (2) the assessment of the
17 Project's adverse effects on historic properties, and (3) the mitigation of those adverse
18 effects, would take place after BLM issued the ROD and ROW permit to SunZia, but before
19 Project construction began. (Doc. 16-33 at 54; see Doc. 31-2 at 54.) The PA was signed by
20 BLM, SunZia, the Arizona and New Mexico State Historic Preservation Officers (SHPO),
21 and the Advisory Council on Historic Properties (ACHP). (See Doc. 16-24.) ASW signed
22 the PA as a concurring party. (*Id.* at 54.) The Tohono O'odham Nation and San Carlos
23 Apache Tribe did not sign the PA. (*Id.* at 39, 45)

24 Thirty days later, in January 2015, BLM issued the ROD approving BLM's
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26 ³ The National Park Service commented that the DEIS section on tribal concerns was
27 minimal and further efforts were needed. (Doc. 16-19 at 41-43.) ASW criticized BLM's
28 failure to timely initiate the Section 106 process. (Doc. 16-20 at 2-3.) The San Carlos
Apache Tribe expressed strenuous opposition to a route through San Pedro Valley (Doc.
16-21 at 6). The Tohono O'odham Nation did not comment.

1 preferred route through the San Pedro Valley. (Doc. 16-25 at 2; Doc. 30-1 at 2.) BLM
2 issued the ROW permit to SunZia in 2016. (Doc. 16 at 20; Doc. 35-1 at 14.)

3 Per the PA, the Section 106 process continued after BLM's issuance of the ROD
4 and the ROW. (Doc. 16 at 20; Doc. 16-33 at 54.) In 2018, BLM conducted Class III
5 surveys, which entailed pedestrian surveys of the Area of Potential Effect (APE) along the
6 Project route. (Doc. 28 at 6-7.) The findings were synthesized in a draft Cultural Resource
7 Inventory Report and distributed to the consulting parties for a 60-day comment period.
8 (Doc. 28 at 8.) Plaintiffs did not comment on any unidentified historic properties or raise
9 concerns about the adequacy of BLM's identification effort. (Doc. 33-2 at 97-111, 119-20;
10 Doc. 28 at 8-9.) The Arizona SHPO and the ACHP concurred with the findings of the Class
11 III Inventory Report and the report was finalized in June 2018. (Doc. 33-2 at 129-30; Doc.
12 28 at 9.)

13 In November 2018, an indirect visual effects assessment of the cultural resources
14 identified in the Inventory Reports was distributed to consulting parties for a 60-day
15 comment period. (Doc. 33-3 at 6; Doc. 28 at 10.) This report assessed visual effects on
16 cultural resources within five miles of the Project route. (Doc. 33-3 at 6; Doc. 28 at 10.)
17 Plaintiffs did not comment on the visual effects assessment. (Doc. 33-3 at 9-11; Doc. 28 at
18 10.)

19 In 2020, SunZia applied to BLM for an amendment to the existing ROW Grant to
20 modify the Project route through New Mexico. (Doc. 29 at 4.) The application also
21 identified access roads and temporary disturbance areas in Arizona for construction along
22 the Project route. (*Id.*) The application did not seek any change to the route in or around
23 the San Pedro Valley. (*Id.*)

24 In March 2023, the Tohono O'odham Nation and the San Carlos Apache Tribe sent
25 letters to BLM identifying the middle San Pedro Valley as a TCP and requesting that BLM
26 "thoroughly reconsider alternative routes." (Doc. 16-32.) BLM met with the consulting
27 parties on April 13, 2023 to discuss the Project and BLM's implementation of the PA.
28 (Doc. 28 at 12; Doc. 33 at 18.) During that meeting, BLM stated that it would not consider
alternative Project routes because the final Project route had been determined by the 2015

1 ROD. (Doc. 33 at 18.)

2 On June 20, 2023, a draft of the Arizona Historic Properties Treatment Plan
3 (HPTP),⁴ BLM's plan for mitigating adverse effects to historic properties within the APE,
4 was provided to consulting parties for a 45-day review period. (Doc. 28 at 13; Doc. 33-4
5 at 18.) In accordance with the PA, a consultation meeting was held on July 14, 2023, during
6 the 45-day review. (Doc. 28 at 10; Doc. 33-4 at 24.) On August 8, 2023, BLM met with
7 the Four Southern Tribes⁵ to discuss the HPTP. (Doc. 33 at 20.) On August 29, 2023, BLM
8 distributed a revised Arizona HPTP to the consulting parties for an additional 21-day
9 review. (Doc. 28 at 13-14.) The HPTP became final September 29, 2023. (*Id.* at 14.)

10 In August 2023, Plaintiff Tribes and ASW invoked the dispute resolution procedure
11 in the PA asserting that BLM disregarded their requests to identify and consider TCPs
12 including the likelihood that the San Pedro Valley was itself a TCP. (Doc. 31-2 at 89-91.)

13 BLM issued the Limited Notice To Proceed (LNTP) to SunZia to begin construction
14 in the San Pedro Valley on September 28, 2023. (Doc. 31-3 at 12.)

15 On October 31, 2023, Plaintiff Tribes and ASW urged the Secretary of the Interior
16 to intervene and halt construction. (*Id.* at 26-29.) On November 8, 2023, BLM ordered an
17 immediate temporary suspension of SunZia's activities in the San Pedro Valley. (Doc. 35-
18 1 at 21.) On November 24, 2023, BLM sent a letter to Plaintiff Tribes and ASW stating
19 that rerouting the Project out of the San Pedro Valley was not an option and that BLM was
20 never given sufficient details to consider the San Pedro Valley, or any of the resources
21 within it, a TCP. (Doc. 31-3 at 65-71.) On November 27, 2023, the BLM director notified
22 Plaintiff Tribes and ASW that the suspension of the LNTP would be lifted and construction
23 would proceed. (Doc. 31-4 at 4-5.)

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25 ⁴ The HPTP relied on the Class III Cultural Resource Inventory Report.

26 ⁵ The Four Southern Tribes coalition consists of representatives from the Gila River Indian
27 Community, the Salt River Pima-Maricopa Indian Community, the Ak-Chin Indian
28 Community, and the Tohono O'odham Nation. (Doc. 33-2 at 14.)

II. DISCUSSION

On January 30, 2024, Plaintiffs filed the instant Motion for Temporary Restraining Order and Preliminary Injunction to halt construction of the SunZia Project in the San Pedro Valley. (Doc. 16.) Plaintiffs argue that they are likely to succeed on the merits of their claim that BLM violated Section 106 of NHPA. Plaintiffs assert that BLM ignored the repeated entreaties of the Tribes and other stakeholders to evaluate the Project's effects on the San Pedro Valley TCP and cultural landscape until the Project route had become a *fait accompli*. (*Id.* at 30.) Plaintiffs assert BLM failed to make "reasonable and good faith efforts" to identify historic properties and consult with the Tribes. (*Id.* at 33-42.) Finally, Plaintiffs argue that BLM cannot rely on the PA to satisfy its Section 106 obligations. (*Id.* at 30-33.)

A. Legal Framework

1. The Administrative Procedure Act

Section 106 of NHPA does not give rise to a "private" right of action against the federal government. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005). Judicial review of agency decisions under NHPA is governed by the Administrative Procedures Act (APA). *Id.* The APA allows judicial review of a "final agency action," 5 U.S.C. § 704, and such review is highly deferential. *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009). A court may only overturn agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Importantly, an APA claim must be brought within six years of the final agency action that is challenged. 28 U.S.C. § 2401(a); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 n. 12 (9th Cir. 2006).

2. Preliminary Injunction Standard

A preliminary injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Courts only grant preliminary relief when a plaintiff makes "a clear showing" of entitlement. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). When analyzing a motion for preliminary injunction, a court must determine whether the movant has

1 established that: (1) he is likely to succeed on the merits of his claim, (2) he is likely to
2 suffer irreparable harm absent the preliminary injunction, (3) the balance of equities tips in
3 his favor, and (4) a preliminary injunction is in the public interest. *Baird v. Bonta*, 81 F.4th
4 1036, 1040 (9th Cir. 2023). Likelihood of success on the merits is a threshold inquiry and
5 is the most important factor in determining whether preliminary injunctive relief is
6 warranted. *Id.* If the movant fails to show a likelihood of success on the merits, the court
7 need not consider the other factors. *Id.* To establish likelihood of success, the moving party
8 must demonstrate a fair chance of success on the merits, or questions serious enough to
9 require litigation. *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009). Here, Plaintiffs
10 must show, at a minimum, that there are serious questions regarding BLM’s compliance
11 with Section 106.

12 **B. Likelihood of Success**

13 **1. Plaintiffs’ challenges to BLM’s selection of the final Project route are 14 time-barred.**

15 Plaintiffs fail to demonstrate likelihood of success on their claims. Plaintiffs’ claims
16 seek to reroute the Project out of the San Pedro Valley. Plaintiffs are unlikely to succeed
17 because these claims are time-barred. The 2015 ROD constituted final agency action with
18 respect to the determination of the final Project route. The 2015 ROD stated, “a right of
19 way will be granted to SunZia transmission, LLC to allow for the construction and
20 operation of two 500KV transmission lines . . . following the route of BLM selected
21 alternative.” (Doc. 30-1 at 9 (emphasis added).) The ROD outlined the alternative
22 transmission line routes that BLM considered and the rationale behind its decision to adopt
23 the Project route. (*Id.* at 10-11.) The ROD also described the consultation that informed
24 BLM’s decision, including the consultation that occurred under the NEPA and Section 106
25 of NHPA. (*Id.* at 12-14.) The ROD, on its face, informed that it was a final agency decision,
26 stating, “[the Assistant Secretary of Land and Mineral Management’s] approval of these
27 decisions constitutes a final decision of the DOI and . . . any challenges to these decisions
28 . . . must be brought in Federal District Court.” (*Id.* at 3 (emphasis added).) Under the APA,
Plaintiffs had six years to challenge BLM’s 2015 selection of the final project route.

1 Plaintiffs’ 2024 challenge to the ROD is therefore untimely.

2 The six-year limitation period similarly precludes Plaintiffs’ challenges to the
3 adequacy of the Section 106 process underlying the selection of the Project route.⁶ This is
4 because the remedy sought—relocation of the route—would require setting aside the 2015
5 ROD final agency decision. In 2024, this Court cannot revisit BLM’s 2015 decision or the
6 sufficiency of BLM’s actions underlying that decision because challenges to an agency’s
7 final action must be brought within six years. 28 U.S.C. § 2401(a). Thus, any claim that
8 seeks as a remedy, the rerouting of the Project out of the San Pedro Valley, or the reopening
9 of the 2015 ROD, is time-barred.⁷

10 **2. The PA did not contemplate selection of alternative Project routes.**

11 Plaintiffs argue that BLM’s failure to consider alternatives, as required by NHPA,
12 “logically and legally . . . reaches back” to the 2015 ROD. (Doc. 43 at 18.) Plaintiffs assert
13 that they did not appeal the 2015 ROD because the “BLM signaled to consulting parties
14 that the PA process would be the agency’s chosen—and *only*—vehicle for assessing
15 methods to avoid adverse effects to historic properties, including ‘major reroutes’ that were

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17 ⁶ Plaintiffs assert that BLM’s issuance of the 2015 ROD was based on inadequate
18 consultation in violation of the NHPA’s directive to “consult” with involved parties “to
19 develop alternatives to the undertaking that could avoid, minimize, or mitigate” adverse
20 effects to historic properties. (Doc. 16 at 40); 36 C.F.R. § 800.6(a). Plaintiffs argue that
21 BLM should have first consulted with Plaintiff Tribes about alternative routes that might
22 mitigate adverse impacts. (Doc. 16 at 40.) Defendants dispute Plaintiffs’ factual assertions.
23 Defendants argue that BLM coordinated the Section 106 process with the NEPA process
24 and engaged in robust consultation with Plaintiffs that informed the selection of the Project
25 route. (Doc. 27 at 15-18; Doc. 35-1 at 28.) The Court does not reach the merits of this
26 dispute.

27 ⁷ *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104
28 (S.D. Cal. 2010), on which Plaintiffs rely, is inapposite. There, the district court found
BLM violated the NHPA in failing to engage in meaningful consultation with tribes prior
to selecting the final project route. However, in that case, the six-year APA statute of
limitations was not implicated because BLM issued the ROD on October 13, 2010, and
Plaintiffs filed their complaint challenging the adequacy of BLM’s consultation 16 days
later.

1 not examined during the NEPA process.” (Doc. 16 at 32-33). In other words, Plaintiffs
2 believed that as BLM identified historic properties through the ongoing Section 106
3 process, it would consider alternative Project routes to avoid those properties. Plaintiffs
4 misread the PA. The PA does not contemplate rerouting of the Project.

5 When an undertaking is complex, and the full effects to historic properties cannot
6 be readily determined prior to an agency decision, NHPA regulations allow development
7 of a PA to phase the NHPA Section 106 process. 36 C.F.R. § 800.14(b)(2). The PA is a
8 tool for executing the NHPA process: (1) identification of historic properties within the
9 Area of Potential Effects (APE) of the Undertaking that are eligible for listing on the
10 National Register (NHRP); (2) assessment of adverse effects to those historic properties;
11 and (3) resolution of the adverse effects. *Id.* at §§ 800.4–800.6. When a PA is adopted,
12 compliance with the PA’s procedures satisfies the agency’s Section 106 responsibilities.
13 *Id.* at § 800.14(b)(2)(iii).

14 Here, the 2015 ROD expressly adopted the “phased approach” to the Section 106
15 process and provided that the identification and evaluation of cultural resources would “be
16 completed *after the ROD and right-of-way permit are issued*, but prior to Project
17 construction.” (Doc. 16-33 at 54 (emphasis added).) The ROD and the PA were intended
18 to work in conjunction with one another—the ROD determining the final Project route and
19 the PA outlining BLM’s Section 106 obligations moving forward. The PA was
20 incorporated within the 2015 ROD decision, (*see* Doc. 16-25 at 5), and the PA contained a
21 “Project Description,” which included a map and detailed description of the preferred
22 Project route. (Doc. 16-24 at 22.)

23 The PA does not provide for further selection of a Project route. The PA does state
24 that “[a]voidance measures for cultural resources may include (but are not limited to)
25 *realignment* of the transmission line.” (Doc. 16-24 at 9 (emphasis added).) Although
26 neither the PA nor NHPA define the term “realignment,” in common usage, “realignment”
27 means “changing the position or direction of something slightly.” *Realignment*, Oxford
28 Learners Dictionary (2024). Thus, although the PA’s terms require BLM to prioritize the
avoidance of “all types of historic properties,” including through “realignment” of the

1 Project, the use of the term “realignment” supports Defendants’ assertion that the PA
2 allowed for slight modifications to the Project route; it did not provide for the selection of
3 an entirely new route.⁸

4 **3. BLM’s issuance of the LNTPs did not reopen the 2015 ROD.**

5 Plaintiffs assert that the 2015 ROD was the culmination of the NEPA process, but
6 the 2023 LNTPs set forth BLM’s final agency action with respect to the NHPA process.
7 (Doc. 43 at 13-17.) According to Plaintiffs, the LNTPs are challengeable final agency
8 actions because the LNTPs signify the end of BLM’s decisionmaking process under NHPA
9 and its conclusion that construction activities would not adversely affect historic properties.
10 (*Id.* at 14-15.) Because the LNTPs were issued in 2023, Plaintiffs reason that their
11 challenge to BLM’s selection of the Project route is timely. The Court concludes that the
12 LNTPs did not constitute final agency action with respect to the selection of the Project
13 route.

14 A Notice to Proceed authorizes construction on a project. (*See, e.g.*, Doc. 31-3 at
15

16 ⁸ The record shows that Plaintiffs were aware that BLM’s selection of a route would
17 preclude consideration of alternative routes. In an August 2012 letter to BLM, ASW stated
18 that “complying with Section 106 now will ensure that BLM does not select a project
19 alternative before Section 106 consultation, *which would impermissibly foreclose*
20 *alternatives, such as selecting a different route or route segments*, to ‘avoid, minimize, or
21 mitigate’ the adverse effects of the project.” (Doc. 16-20 at 3 (emphasis added).) Similarly,
22 in a December 2012 letter to BLM, ACHP Director Reid Nelson wrote:

23 We note that BLM chose the preferred alternative for the undertaking before
24 initiating Section 106 consultation . . . Consulting parties under Section 106
25 are now requesting *refinements in the preferred alternative* to ensure that
26 identified historic properties along that route are taken into account. We urge
27 BLM to work with these parties to ensure that their concerns are addressed
28 and that, wherever possible, *the preferred route be adjusted* to avoid adverse
effects.

(Doc. 33-1 at 16 (emphasis added).) Also, in 2012, a BLM representative noted that he had
a detailed discussion with an officer of the San Carlos Apache Tribe “about all the reasons
BLM chose the preferred alternative and [the tribal officer] agree[d] that it [did] appear to
be the best choice under the circumstances.” (*See* Doc. 33-2 at 30.)

1 12; *see, e.g.*, Doc. 31-4 at 4.) It signals that all pre-construction conditions have been met
2 and that work can begin according to the terms laid out in the previous contract. (*Id.*) An
3 LNTP specifies which portions of a job the contractor should begin work on. (*Id.*)

4 Here, the LNTPs authorized construction to begin on the route, as previously
5 outlined in the 2015 ROD. (*Id.*) As such, it was the 2015 ROD, not the LNTPs, that
6 approved the route through the San Pedro Valley. The issuance of the LNTPs simply
7 indicated that all pre-construction conditions were met. The ongoing nature of the Section
8 106 process did not prevent the 2015 ROD from constituting final agency action. Neither
9 BLM's ongoing obligations under the PA, nor the issuance of the LNTPs, provide a back
10 door to reopening the 2015 ROD. In *Battle Mountain Band v. United States Bureau of Land*
11 *Mgmt.*, No. 3:16-CV-0268-LRH-WGC, 2016 WL 4497756, at *6 (D. Nev. Aug. 26, 2016),
12 the district court held that the identification of eligible TCPs in the Area of Potential Effect
13 after the ROD had been issued did not require BLM to reexamine its ROD and other
14 relevant decisions before allowing construction to proceed. Like the court in *Battle*
15 *Mountain Band*, the Court concludes that Plaintiffs cannot use the PA process or the LNTPs
16 to challenge the selection of the final Project route.

17 **C. BLM's compliance with the PA**

18 Plaintiffs argue that BLM cannot rely on the PA to show that it has satisfied its
19 Section 106 obligations because BLM failed to carry out its duties under the PA. (Doc. 16
20 at 30-33; Doc. 43 at 20-23.) According to Plaintiffs, BLM delayed meaningful consultation
21 regarding TCPs until after the Project route had been set and refuses to consider measures
22 to avoid impacts to TCPs, despite BLM's assurances that the PA process "should be broad
23 enough and flexible enough to allow for all manner of avoidance and mitigation." (Doc. 43
24 at 20.) Plaintiffs conclude that BLM has not, therefore, complied with the Section 106
25 process.

26 Because federal regulations state that an agency's compliance with a PA fulfills its
27 Section 106 responsibilities, a court must analyze the PA to determine whether agency
28 action is compliant with the PA's terms. *See Dine Citizens Against Ruining Our Env't v.*
Bernhardt, 923 F.3d 831, 847 (10th Cir. 2019) (stating that the issue to resolve is whether

1 agency violated requirements of a PA); *Colo. River Indian Tribes v. Dep't of Interior*, No.
2 ED CV-1402504 JAK (SPx), 2015 WL 12661945, at *13 (C.D. Cal. June 11, 2015)
3 (explaining that obligations under a PA serve as a substitute to compliance with Section
4 106). An executed PA “is legally binding on the agency” and “shall govern the undertaking
5 and all its parts.” ADVISORY COUNCIL ON HISTORIC PRESERVATION, Types of Agreement
6 Documents in Section 106 (September 25, 2018),
7 [https://www.achp.gov/sites/default/files/2021-11/TypesofAgreementDocuments11-19-](https://www.achp.gov/sites/default/files/2021-11/TypesofAgreementDocuments11-19-21.pdf)
8 [21.pdf](https://www.achp.gov/sites/default/files/2021-11/TypesofAgreementDocuments11-19-21.pdf). As such, “[PAs] must be written carefully and clearly so that everyone understands
9 what they call for and the agency is able to fully carry out all legal obligations to which it
10 has agreed.” (*Id.*)

11 The 2014 PA sets forth the process for BLM to satisfy its Section 106 obligations
12 and proceeds in several phases. Relevant here, the first phase of the PA required BLM to
13 identify historic properties by completing a Cultural Resources Inventory Report and
14 soliciting feedback from consulting parties. (Doc. 16-24 at 6-9.) In the second phase, the
15 PA requires BLM to mitigate adverse impacts of the Project on historic properties by
16 developing a Historic Property Treatment Plan. (*Id.* at 9.) The Court concludes that
17 Plaintiffs do not raise serious questions with respect to BLM’s implementation of the PA
18 because BLM (1) complied with its obligation to identify historic properties, (2) considered
19 measures to avoid adverse impacts to historic properties, and (3) consulted with Plaintiff
20 Tribes during each phase of the PA.

21 **1. BLM identified historic properties that could be affected by the Project.**

22 Plaintiffs argue that BLM failed to lawfully identify historic properties because it
23 concluded that the San Pedro Valley neither contained nor comprised a TCP. (Doc. 16 at
24 33.) Plaintiffs assert that despite repeatedly informing BLM for decades of the tribal
25 significance of the San Pedro Valley as a TCP, BLM never followed up on that information
26 and instead, willfully ignored it. (*Id.* at 37.)

27 With respect to the identification of historic properties, including TCPs, phase one
28 of the PA required BLM to “complete a cultural resources inventory to identify historic
properties that could be affected by the Undertaking.” (*Id.* at 6.) Specifically, the PA

1 obligated BLM to: (1) conduct a Class I survey to compile existing data of all previously
2 recorded cultural resources within .25 mile of the APE; (2) conduct a Class III Intensive
3 Field Inventory of the direct effects of the APE including an assessment of visual impacts
4 on historic properties within the direct and indirect APE; and (3) prepare a comprehensive
5 Inventory Report incorporating the findings from those surveys providing for a 60-day
6 comment period for consulting parties. (*Id.* at 6-7.)

7 BLM complied with the requirements of phase one by completing the Class I and
8 Class III inventories and soliciting comments from the Tribes on the adequacy of the
9 identification process. Previously, during the EIS phase, BLM conducted Class I and Class
10 II surveys in an effort to identify historic properties. (Doc. 28 at 3-4.) The Class I survey
11 involved collecting and reviewing previous surveys of recorded archaeological sites and
12 historic resources within the area for the proposed Project route and alternatives. (*Id.*) To
13 supplement the Class I survey, the Class II survey assessed where cultural resources would
14 likely occur along the various alternative routes. (*Id.*) The Class I and Class II survey results
15 were included in the DEIS for comment (Doc. 28 at 3-4), as well as in the FEIS (Doc. 29-
16 2 at 10, 24).

17 BLM conducted the Class III intensive field inventory in 2018, which entailed one-
18 hundred-percent pedestrian ground coverage of the APE. (Doc. 28 at 6-7.) The Class III
19 survey resulted in the identification of 73 cultural sites, of which BLM recommended that
20 59 be determined eligible for the NRHP and 14 be determined not eligible. (Doc. 33-2 at
21 113.) Based on the Class III survey, a Draft Cultural Resources Inventory Report was
22 prepared and distributed to consulting parties in 2018, including Plaintiff Tribes and ASW,
23 for a 60-day comment period. (Doc. 28 at 8.)

24 Once the Draft Cultural Resources Inventory Report was distributed for review, the
25 PA provided for consulting parties to comment on (1) the adequacy of the identification
26 effort, (2) the NRHP eligibility of the cultural resources identified, (3) the assessment of
27 effect of the undertaking, and (4) whether there were *any properties of traditional cultural
28 or religious importance* to tribes and ethnic groups that were *not identified in the
inventory.*” (Doc. 16-24 at 7 (emphasis added).) Plaintiffs did not assert any unidentified

1 TCPs during the comment period on the Draft Cultural Resources Inventory Report.⁹ (Doc.
2 35-1 at 16; Doc. 33-2 at 97-111, 119-20.) The SHPO and ACHP concurred with the
3 findings of the Arizona Class III Inventory Report, and the reports were finalized in June
4 2018. (Doc. 33-2 at 129-30.)

5 Plaintiffs state they did not identify TCPs in response to the Draft Cultural
6 Resources Inventory Report because they believed that BLM would conduct a separate
7 landscape study, which would be the more appropriate forum for raising unidentified
8 TCPs.¹⁰ (Doc. 43 at 20.) The PA, however, did not obligate BLM to conduct a cultural
9 landscape study, (*see* Doc. 16-24), and any representations¹¹ that such a study would be

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11 ⁹ Plaintiffs argue that the facts of this case are analogous to *Pueblo of Sandia v. United*
12 *States*, 50 F.3d 856 (10th Cir. 1995). There, the court found that the Forest Service failed
13 to follow up on information from plaintiffs, even though it knew plaintiff tribes might be
14 “hesitant to divulge the type of information” it was seeking. *Id.* at 860-61. The court also
15 found the Forest Service did not act in good faith, because it had withheld information from
16 the SHPO that, once disclosed, caused the SHPO to withdraw its concurrence with the
17 agency’s findings. *Id.* at 858, 862-63. Here, BLM provided opportunities for Plaintiffs to
18 comment on the adequacy of BLM’s identification efforts and there is no evidence
19 suggesting that BLM’s execution of the PA was compromised by lack of integrity or
20 omission, such as by manipulating or ignoring evidence. In fact, the SHPO concurred with
21 BLM’s findings. (Doc. 33-2 at 129-30.)

22 ¹⁰ Plaintiffs first raise this argument in their reply, (Doc. 43 at 20), depriving Defendants
23 of an opportunity to respond. The Court rejects the argument for this additional reason. *See*
24 16 C. Wright, A. Miller, E. Cooper, & E. Grossman, Federal Practice and Procedure §
25 3974 at 428 (1977) (“[C]ourt decisions have made it clear that the appellant cannot raise
26 new issues in a reply brief; he can only respond to arguments raised for the first time in
27 appellee’s brief.”); *Knighen v. Commissioner*, 702 F.2d 59, 60 n. 1 (5th Cir.), *cert. denied*,
28 464 U.S. 897 (1983) (“It is impermissible to mention an issue for the first time in a reply
brief because the appellee then has no opportunity to respond.”).

29 ¹¹ Plaintiffs point to two representations that a landscape study would be conducted. First,
30 during the 2018 draft Cultural Resources Inventory Report comment period, a Tohono
31 O’odham Tribal Officer inquired about a cultural landscape study. A BLM representative
32 responded, “we agreed to do [a landscape study] separate from the class III.” (Doc. 33-2 at
33 111.) Second, in a January 2024 self-certification letter to the Arizona Corporation
34 Commission, SunZia acknowledged that a condition of the Commission’s February 2016
35 issuance of a Certificate of Environmental Compatibility required: “A Class III cultural

1 completed, were not of such a nature that they amended the PA. Consequently, BLM’s
2 decision to proceed without a cultural landscape study was not a violation of the PA or
3 Section 106. BLM fulfilled its obligations under the PA to identify historic properties
4 through a Class III survey and to prepare a Cultural Resources Inventory Report. Plaintiffs
5 had an opportunity, under the terms of the PA, to raise unidentified properties of traditional
6 cultural or religious importance during the review and comment period on the report.
7 Plaintiffs did not voice concerns about the adequacy of BLM’s efforts to identify TCPs
8 until March 2023. (Doc. 16-32 at 3.)

9 **2. BLM avoided adverse impacts to historic properties.**

10 With respect to mitigating adverse impacts to historic properties, the PA required
11 BLM to, “if possible, avoid adverse effects to all types of historic properties.” (Doc. 16-24
12 at 9.) Avoidance measures included, but were not limited to, “realignment of the
13 transmission line, fencing of sites during construction, monitoring or construction near site,
14 or placing towers, maintenance roads and ancillary facilities outside of site boundaries.”
15 (*Id.*) Where avoidance measures were not possible, BLM was required to “minimize or
16 mitigate adverse effects to historic properties.” (*Id.*) With respect to the resolution of
17 adverse effects, the PA required that BLM develop a Historic Property Treatment Plan to
18 “identify the nature of the effects to historic properties and describe the strategies proposed
19 to avoid, minimize, or mitigate those effects.” (*Id.*)

20 Plaintiffs assert that BLM’s failure to comply with the PA is “demonstrated by its
21 refusal to meaningfully consider measure to avoid impacts to TCPs.” (Doc. 16 at 31.)
22 Plaintiffs argue that the “avoidance” mandated by the PA required BLM to consider the
23 San Pedro Valley as a TCP that must be avoided entirely by the Project route. (*Id.* at 32.)
24 The Court has already rejected this claim and concludes that it is time-barred. (*See* Section

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26 resource survey and cultural landscape study shall be conducted to fully evaluate the
27 impacts of the Project on the cultural landscape.” (Doc. 43-11 at 27-28.) In the letter,
28 SunZia reported that BLM indicated that it received inadequate information to justify the
development of a separate, new landscape scale cultural resources study. (*Id.*)

1 B.1.) To the extent that Plaintiffs argue that the San Pedro Valley *contains* TCPs that BLM
2 has refused to avoid, Plaintiffs have yet to identify any TCPs, or other historic properties
3 that BLM overlooked in NHPA process.¹² On the contrary, the record supports BLM’s
4 assertion that the Project route avoids direct impacts to all cultural resource sites identified
5 by consulting parties in the San Pedro basin.¹³

6 Finally, BLM complied with its obligation to prepare an HPTP to identify historic
7 properties and outline efforts to mitigate adverse impacts of the Project. The process for
8 developing the Arizona HPTP began in 2018 with the Class III pedestrian cultural
9 resources survey of the APE. (Doc. 28 at 10.) On June 20, 2023, BLM submitted the HPTP
10 to consulting parties for an initial review. (Doc. 28 at 13; Doc. 33-4 at 18, 21-22.) In

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12 ¹² During oral argument, the Court asked Plaintiffs whether their assertion was that the San
13 Pedro Valley constituted a TCP, whether it contained TCPs, or both. Plaintiffs responded
14 that it was too premature to say. (Doc. 53 at 35-36) (“Whether there is a TCP, whether it’s
15 the entire valley or parts thereof, it’s premature I think to speculate on.”). While BLM is
16 required to conduct follow up investigation to identify historic properties, 36 C.F.R. §
17 800.4, BLM is not required to conduct a “fishing expedition” for unidentified TCPs.
18 *Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223, 1232 (9th Cir. 1999) (“There has to be
19 some good evidence of just where the site is and what its boundaries are, for it to qualify
20 for federal designation as a historical site.”). Once Plaintiffs invoked the PA dispute
21 resolution mechanism, BLM requested (1) the location and tangible features of the claimed
22 TCP be identified and (2) an explanation of how those features fit within the relevant
23 National Register criteria. (Doc. 28 at 12; Doc. 28-6 at 3.) Apart from recently asserting a
24 valley-wide TCP, Plaintiffs have not identified tangible locations that could be considered
25 for eligibility as a TCP. (Doc. 27 at 34; *cf.* Doc. 27 at 35, n. 7.)

26 ¹³ During the EIS phase, ASW identified ten priority conservation areas in the San Pedro
27 Valley, and BLM ensured that they were avoided by the Project route. (Doc. 28 at 4-5.)
28 Based on input from Tohono O’odham tribal members during the 2012 field visit to San
Pedro Valley, the Project route was redesigned to avoid direct impacts to a cluster of
cultural sites near the San Pedro River. (Doc. 16-34 at 95-96.) During the Class III survey,
which included the participation of tribal cultural resource specialists, fourteen
archaeological sites were found within the San Pedro Basin and direct impacts to those
sites were avoided. (Doc. 28 at 8.) Ultimately, “[i]n Arizona, 63 historic properties were
found within the Area of Potential Effects (APE), 43 were avoided or effects were
determined to not be adverse and 20 were subjected to adverse effects and mitigated (or
will be mitigated) prior to construction.” (Doc. 33 at 22.)

1 accordance with the PA, a consultation meeting took place during the 45-day review on
2 July 14, 2023. (Doc. 33-4 at 24; Doc. 33 at 20.) During this meeting, BLM and other
3 consulting parties discussed the proposed treatments for direct effects to most Arizona sites
4 and BLM related that it intended to develop a second HPTP to resolve the adverse visual
5 and indirect effects to certain properties.¹⁴ (Doc. 33 at 20.) BLM received comments on the
6 draft HPTP from the Arizona SHPO and other consulting parties. (Doc. 33 at 20; Doc. 33-
7 4 at 34-36, 37-50.) BLM addressed the comments and transmitted a revised Arizona HPTP
8 to the consulting parties for a final 21-day review on August 28, 2023. (Doc. 33 at 21; Doc.
9 33-4 at 56-57.) The Arizona HPTP was finalized in consultation with the State Historic
10 Preservation Officer, in accordance with the PA, on September 29, 2023. (Doc. 33 at 21;
11 Doc. 33-4 at 59.)

12 **3. BLM is complying with its obligation to “continue to consult” with**
13 **Tribes throughout the Section 106 process.**

14 Section 106 consultation must afford Tribes “a reasonable opportunity to identify
15 concerns about historic properties, advise on the identification and evaluation of historic
16 properties, including those of traditional religious and cultural importance, articulate [their]
17 views on the undertaking’s effects on such properties, and participate in the resolution of
18 adverse effects.” 36 C.F.R. § 800.2.5. However, “consultation” does not require agreement
19 among parties, nor does NHPA require that the consulting parties support the final
20 outcome. 36 C.F.R. § 800.16(f). Rather, consultation is “the process of seeking, discussing,
21 and considering the views of other participants, and, where feasible, seeking agreement
22 with them regarding matters arising in the Section 106 process.” *Id.*

23 The PA required that BLM consult with the Tribes at each phase in the process. (*See*
24 Doc. 16-24.) For example, during the identification phase, BLM was required to “continue
25 to consult with Indian tribes regarding properties of traditional religious and cultural

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27 ¹⁴ Plaintiffs state that the second HPTP has not been distributed to consulting parties, even
28 as construction proceeds in the San Pedro Valley causing irreparable harm. (Doc. 16 at 24.)
However, BLM apparently has not yet issued any LNTPs for segments of the transmission
line that have not been addressed in the HPTP. (Doc. 35-1 at 33; Doc. 32 at 11.)

1 importance to them that might be affected by the Undertaking,” and “provide opportunities
2 for review and comment on draft and final versions of the Inventory Report.” (Doc. 16-24
3 at 8.) During the mitigation phase, BLM was required to, “develop avoidance measure for
4 any properties of religious or cultural importance in consultation with the SHPO and
5 affected tribes.” (*Id.* at 9.) The PA also required BLM to provide consulting parties with
6 the draft HPTP for their review, “requesting comments on the adequacy of the proposed
7 treatment measures,” and “meeting . . . with all interested consulting parties during the
8 review period.” (*Id.* at 12.)

9 BLM solicited feedback from Plaintiff Tribes during each phase of the PA process,
10 inviting Plaintiff Tribes to comment and consult on the Cultural Resource Inventory
11 Report, the visual assessment survey, and the HPTP. (Doc. 28 at 8, 10, 13; Doc. 33 at 14,
12 20.) BLM made efforts to consult with Plaintiffs in March 2023 after the San Carlos
13 Apache Tribe and the Tohono O’odham Tribe sent letters to BLM explicitly identifying
14 the San Pedro Valley as a TCP and requesting that the agency “thoroughly reconsider
15 alternative routes.” (Doc. 16-32 at 3.) On March 17, 2023, BLM attended the Four Southern
16 Tribes Cultural Resources Working Group meeting to address questions and concerns
17 raised by Plaintiffs. (Doc. 28 at 12.) BLM met with the consulting parties again on April
18 13, 2023, to give an update on the Project and explain how they were implementing the
19 PA. (Doc. 33-3 at 78.) BLM explained that they would not be revisiting the 2015 routing
20 decision through the San Pedro Valley. (*Id.*) BLM held another meeting with consulting
21 parties on July 14, 2023, to answer questions and discuss proposed archaeological
22 treatments. (Doc. 33-4 at 24.) On August 8, 2023, BLM met with the Four Southern Tribes
23 at the request of the Tohono O’odham Nation to discuss the HPTP. (Doc. 28 at 13.) The
24 record demonstrates clear efforts by BLM to meet with Tribes to address their concerns.

25 When Plaintiff Tribes and ASW invoked the dispute resolution process in August
26 2023 (Doc. 31-2 at 89-91), BLM suspended construction in the San Pedro Valley and
27 attempted to consult with Plaintiffs. (Doc. 35-1 at 21). On November 14, 2023, a virtual
28 meeting took place with the disputing parties, BLM and ACHP in attendance. (Doc. 31-3
at 62-63.) Parties came to an impasse when it became evident that Plaintiffs wanted BLM

1 to evaluate the San Pedro Valley as a TCP and consider rerouting the Project in order to
2 avoid adverse impacts to a valley-wide TCP. (*Id.* at 65-70.) Nevertheless, consultation
3 efforts with the Tribes remain ongoing and a working group comprised of various tribal
4 members and other experts has been tasked with considering the appropriate mitigation
5 efforts for the San Pedro Valley. (Doc. 35-1 at 22, 35.) In a November 24, 2023 letter to
6 the Chairman of the Tohono O’odham Tribe, BLM stated:

7 We will continue to make every effort to consult with you and other Tribes,
8 obtain information from the Tribes about San Pedro Valley, and to develop,
9 as appropriate, treatment plans to address any adverse effects. We hope to
10 proceed expeditiously and *would be willing to assume the San Pedro Valley
is a TCP* in order to immediately begin to discuss mitigation.

11 (Doc. 31-3 at 69 (emphasis added).)

12 Plaintiffs compare the lack of consultation by BLM in *Quechan*, 755 F. Supp. 2d at
13 1109, with BLM’s alleged lack of consultation with the Tribes in this case. However, in
14 *Quechan*, the impacted tribes actively sought to consult with BLM by responding to BLM’s
15 letters and requesting more in-depth consultation, but BLM either ignored or never granted
16 those requests. *See id.* at 1118-20. Here, as detailed above, Plaintiff Tribes were afforded
17 various consultation opportunities. Moreover, BLM continues to consult with parties to
18 address their concerns. (Doc. 31-3 at 69.) For these reasons, the Court concludes that
19 Plaintiffs have failed to show that BLM did not comply with the Section 106 process
20 provided in the PA.

21 In sum, Plaintiffs have not satisfied the threshold inquiry by demonstrating that they
22 are likely to succeed on the merits of their claims. Therefore, the Court does not address
23 the other preliminary injunction factors. Accordingly,

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IT IS ORDERED that Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 16) is **denied**.

Dated this 16th day of April, 2024.


Jennifer G. Zippo
United States District Judge